Supreme Court, U.S.
FILED
JAN 17 1983
ALEXANDER L. STEVAS

No. 82-798

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL WARREN COLETTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners, white males, had standing to raise an equal protection challenge to procedures employed for selection of grand jury forepersons that they alleged to have resulted in underrepresentation of women and blacks.

2. Whether the Drug Enforcement Administration unlawfully failed to alter the controlled substance classification of cocaine.

3. Whether the warrantless search of a container found in an automobile, supported by probable cause to search the automobile, is impermissible under the Fourth Amendment because commenced contemporaneously with a lawful arrest, or because completed later on, at another location.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-27) is reported at 682 F.2d 820.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1982. A petition for rehearing was denied on September 2, 1982 (Pet. App. B). The petition for a writ of certiorari was filed on November 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioners Michael Coletta, John Wilms, Herve Bitton, and Hernan Castro were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and

846. In addition, petitioner Coletta was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Coletta received concurrent sentences of ten years' imprisonment and a $25,000 fine on each count; petitioner Wilms was sentenced to two years' imprisonment and petitioner Castro to five years' imprisonment. Petitioner Bitton was sentenced pursuant to the Youth Corrections Act, 18 U.S.C. 5010. The court of appeals affirmed.

1. The trial stipulations and the evidence adduced at a suppression hearing showed that Robert Prezioso, a Drug Enforcement Administration Special Agent, purchased one ounce of cocaine from petitioner Hernan Castro and his cousin, Carlos Castro, in March 1981.[1] After the Castros indicated that they were able to provide larger quantities of cocaine, Prezioso arranged to purchase eight kilograms of cocaine for $500,000 (Pet. App. A-3).

On the day of the sale, Prezioso drove with Hernan Castro to a bank, where Castro was permitted to count the $500,000 in cash. Satisfied with Prezioso's ability to pay, Castro signalled his co-conspirators that Prezioso's "partner," an informant named Raymond Angelone, should be allowed to examine the cocaine. Angelone went to the Castros' apartment, where he met petitioners Wilms and Bitton. Bitton took Angelone to petitioner Coletta's apartment, where Coletta showed Angelone a brown travel bag filled with eight bags of cocaine. Angelone tested the drugs and informed Coletta that he was satisfied with their quality and that the transaction could proceed. Coletta returned the cocaine to the travel bag and zipped the bag. Coletta and

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[1]Carlos Castro was also convicted of conspiracy to distribute cocaine; he did not appeal his conviction.

Angelone then drove back to the Castros' apartment in Coletta's car to meet Prezioso and complete the transaction (Pet. App. A-4).

Angelone and petitioner Coletta waited in the car outside the apartment. Angelone, carrying his own travel bag, got into the back seat. Pursuant to his instructions from law enforcement officers, Angelone unzipped Coletta's bag and prepared to transfer the cocaine to his own bag. Coletta insisted that Angelone leave the cocaine in place, however, and Angelone returned to the front seat, leaving both bags unzipped (Pet. App. A-5). Petitioner Wilms next approached Agent Prezioso's car, also waiting outside the apartment, and confirmed the presence of the cash. When Wilms indicated to Coletta that the exchange could take place, Prezioso gave surveilling agents an arrest signal. The DEA agents then approached Coletta's car. Coletta started the engine. Agent Prezioso instructed him to stop the car, arrested him and removed him from the vehicle. Prezioso then reached into the back seat and seized the two travel bags. The bag placed in the car by Angelone was empty; the other, Coletta's bag, contained eight kilograms of cocaine (Pet. App. A-17 to A-18).[2]

2. Prior to trial, petitioners filed motions to dismiss the indictment on the basis of alleged irregularities in the jury selection process in the Northern District of California. They observed that 25 of the 28 grand jury forepersons selected between January 5, 1977, and June of 1981 in that district were white males, and that, of the others, two were female and none was black. Petitioners alleged that a non-random method of selection was employed that had been

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[2]A later search of petitioner Coletta's apartment pursuant to a search warrant yielded an additional 16 ounces of cocaine, which provided the basis for the second charge against him (Pet. App. A-5 to A-6).

abused to discriminate against women and blacks. These practices, petitioners argued, violated their equal protection interests.

The district court held that petitioners, as white males, lacked standing to complain of discrimination against women and minorities. It accordingly denied petitioner's request for an evidentiary hearing. The district court remarked, however, that petitioners might "have some standing on other alleged constitutional grounds" (see Pet. App. A-7 & n.3).

The court of appeals affirmed, holding that because they were not members of the allegedly excluded group and had experienced no injury to their personal rights to equal protection, petitioners lacked standing to assert any equal protection claim (Pet. App. A-12). The court of appeals further concluded that petitioners had standing, under *Peters* v. *Kiff*, 407 U.S. 493 (1972), to challenge the selection procedures on due process grounds. The court determined, however, that petitioners' allegations were insufficient to state a due process claim (Pet. App. A-13):

> Perhaps under some circumstances systematic discrimination in the appointment of grand jury forepersons would so imperil the integrity of the jury system that the resulting indictments and convictions would be fundamentally unfair. However, [petitioners] have failed to suggest how the selection of one person, serving on a correctly constituted panel, could have a significant impact on the basic fairness of the process.

ARGUMENT

1. Petitioners contend initially (Pet. 9-15) that the court of appeals erroneously held that they lacked standing to seek dismissal of the indictment on the ground that women and minority groups, to which they do not belong, had been denied equal protection of the laws by the procedures used

to select grand jury forepersons in the Northern District of California. Significantly, however, petitioners do not challenge — or even acknowledge — the court of appeals' concurrent determinations that they do have standing to challenge those selection procedures on due process grounds, but that their particular allegations are insufficient to state a due process claim. The contention that is advanced here is unsupported by pertinent decisions of this Court and does not warrant further review at this time.

a. As petitioners concede (Pet. 10), no decision of this Court indicates that nonmembers of a class that has allegedly been discriminated against in selection of grand jury forepersons may raise an equal protection claim founded upon such discrimination. Careful examination of this Court's decisions cited by petitioners (Pet. 10-11) reveals, moreover, that they do not contain the contradictory indications respecting such a claim that petitioners attribute to them (Pet. 10).

In *Peters* v. *Kiff*, 407 U.S. 493 (1972), a case decided without an opinion for the Court, Justice Marshall, joined by Justices Douglas and Stewart, concluded (*id.* at 504):

> [W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Although an equal protection claim was also presented, Justice Marshall expressly declined to reach that issue. 407 U.S. at 496, 497 n.5. Moreover, the conclusion stated in the lead opinion was based upon the impact of exclusion of minority members upon the integrity of the judicial process, rather than upon any discriminatory effect suffered by the *Peters* defendant, who was white. *Id.* at 497, 501-504. Justice White, joined by Justices Brennan and Powell,

concurred in the judgment, relying primarily, if not exclusively, upon 18 U.S.C. 243, which provides that racial discrimination in jury selection is a crime (*id.* at 505-507).

Peters therefore does not support petitioners' equal protection claim, because the Court considered only a due process claim resting upon a defective selection procedure for grand and petit jury members that was determined to destroy the integrity of the factfinding process and to violate the criminal proscription of 18 U.S.C. 243. Here, the court of appeals concluded that petitioners *did* have standing to raise such a due process claim, but that the alleged procedural defects in selection of forepersons did not impermissibly affect the "basic fairness of the [indictment] process" (Pet. App. A-13).[3] Moreover, petitioner's allegations plainly do not make out a violation of 18 U.S.C. 243, which does not govern selection of grand jury forepersons.[4] Petitioner has not sought review of the latter conclusion; accordingly he can claim no support from *Peters*.

None of the other decisions of this Court cited by petitioner suggests that a defendant not a member of a class of persons allegedly underrepresented among grand jurors or forepersons may seek dismissal of an indictment on equal protection grounds. *Rose* v. *Mitchell*, 443 U.S. 545 (1979), and *Castaneda* v. *Partida*, 430 U.S. 482 (1977), address the equal protection claims of members of the allegedly underrepresented class. As petitioners acknowledge (Pet. 11), in

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[3]This Court has reserved the question whether discrimination in the choice of grand jury forepersons ever constitutes a denial of equal protection, *Rose* v. *Mitchell*, 443 U.S. 545, 551 n.4 (1979), and has not, to our knowledge, addressed the analogous due process issue. See page 9, note 7, *infra*.

[4]We note as well that the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, makes no provision respecting the selection of grand jury forepersons, and is accordingly, contrary to petitioner's suggestion (Pet. 3-4), inapposite.

Castaneda the Court employed language that strongly suggested a view contrary to theirs (430 U.S. at 492, quoting *Hernandez* v. *Texas*, 347 U.S. 475, 477 (1954)):

> This Court had long recognized that "it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded * * *."

Similar language was employed most recently in *Rose* v. *Mitchell*, *supra*, 443 U.S. at 565.[5]

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[5]Petitioners point to other language in *Rose* (443 U.S. at 556) indicating that "a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded." But *Rose* did not present the question whether a nonmember of the underrepresented group has standing to raise an equal protection claim founded upon alleged discrimination, and the cases cited by the Court in connection with the quoted statement lend no support to petitioner's claim. The language petitioner relies upon, as well as the Court's ensuing statement that an indictment returned by an improperly constituted grand jury is to be quashed "without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage" (*ibid.*), was addressed to the separate question whether a valid conviction upon such an indictment moots any claim of prejudice by a member of the underrepresented group. See 443 U.S. at 551-559. Moreover, Justice Stevens, who by his joinder therein made this portion of the opinion the opinion of the Court, expressed reservations about the rule adopted, joining the opinion because of considerations of stare decisis, 443 U.S. at 593-594. Justice Stevens plainly did not intend to join in any novel holding respecting standing. The views of the *Rose* Court on the standing question are instead reflected in the portion of that opinion addressing the merits (443 U.S. at 565, quoting *Castaneda* v. *Partida*, *supra*, 430 U.S. at 494):

> [I]t remains true that to be entitled to habeas relief the present respondents were required to prove discrimination under the standards set out in this Court's cases. That is, "in order to show that an equal protection violation has occurred in the context of

b. The decision of the court of appeals correctly applies the foregoing decisions of this Court, as well as the decision in *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972), suggesting that a defendant not a member of an underrepresented class lacks standing to pursue an equal protection challenge to an indictment based upon grand jury selection procedures. More generally, the decision of the court of appeals is consistent with the decisions of this Court recognizing that a party ordinarily may not raise the constitutional rights of strangers. *E.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973).[6]

c. Contrary to petitioners' contention (Pet. 12), the decision of the court of appeals does not create a conflict with the Eleventh Circuit's decision in *United States* v. *Perez-Hernandez*, 672 F.2d 1380 (1982), that should be resolved by this Court at this time. To be sure, in *Perez-Hernandez* a panel of the Eleventh Circuit, relying on *Peters* v. *Kiff*,

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grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."

And the Court in *Rose* stressed (443 U.S. at 565) that the respondents before it "as Negroes, are members of" the allegedly underrepresented group. See page 6 note 3, *supra*.

[6]Contrary to petitioners' contention (Pet. 13-14), the relevant equal protection decisions of this Court are not inapposite because they address the rights of plaintiffs in civil litigation. This Court's decisions in criminal cases where constitutional violations are asserted make clear that the defendant must show that the assertion violation was in derogation of his personal rights. See, e.g., *United States* v. *Salvucci*, 448 U.S. 83, 86-87 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Brown* v. *United States*, 411 U.S. 223 (1973); *Alderman* v. *United States*, 394 U.S. 165 (1969). *Peters* v. *Kiff*, *supra*, is not to the contrary. Rather, the decision there merely reflects a determination that the due process rights of every defendant include the right to have critical procedures carried by a competently constituted tribunal. 407 U.S. at 496-497, 498-504.

supra, held that a male of Hispanic descent had standing to raise an equal protection challenge to his indictment based upon alleged discrimination against blacks and women in the selection of grand jury forepersons. 672 F.2d at 1385-1386. The panel recognized that language in *Castaneda* v. *Partida*, and *Rose* v. *Mitchell* suggested a contrary result but rejected that result, reasoning that "[t]he holding in *Peters* v. *Kiff* is clear and unambiguous and has never been expressly overruled." 672 F.2d at 1386 (footnote omitted).

Unlike the court below, the Eleventh Circuit panel failed to observe a distinction between due process claims such as that discussed in *Peters* v. *Kiff* and equal protection claims such as that advanced here. The defendant in *Perez-Hernandez* did not observe this distinction either. See 672 F.2d at 1382-1383. Thus there is no necessary conflict between the decision below, which recognizes a non-member's standing to complain on due process grounds of discrimination that taints the grand jury process, and the decision in *Perez-Hernandez*.[7] On the other hand, to the extent that *Perez-Hernandez* is read to appiy to claims of

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[7]Because petitioners have not sought review of the decision below insofar as their due process claim was deemed legally insufficient, there is no need to consider whether that decision conflicts with the *Perez-Hernandez* court's view (672 F.2d at 1386) that discrimination affecting grand jury foreperson selection, like discrimination in selection of the grand jury itself, may require that a conviction be set aside in an appropriate case. See page 6 note 3, *supra*. We note, in any event, that Judge Morgan did not join this aspect of the panel decision in *Perez-Hernandez* (see 672 F.2d at 1388-1389) and that a different panel of the Eleventh Circuit subsequently endorsed Judge Morgan's view that no constitutional right is implicated in the selection procedures for grand jury forepersons because of the relative insignificance of the role of that office in the federal grand jury system. *United States* v. *Holman*, 680 F.2d 1340, 1356 n.12 (1982). We note as well that this aspect of the decision below turns upon the sufficiency of petitioners' allegations and does not necessarily preclude relief in a case where systematic discrimination was shown. Pet. App. A-13.

discrimination that do not impair the integrity of the indictment process and thus do not implicate due process concerns, it is wrongly decided because the panel overlooked the due process basis for the holding of *Peters* v. *Kiff*. Indeed, a different panel of the Eleventh Circuit has called in question the decision in *Perez-Hernandez*, observing that *Castaneda* v. *Partida*, *supra*, 430 U.S. at 494, contains "unambiguous language" contrary to the earlier panel's conclusion. *United States* v. *Holman*, 680 F.2d 1340, 1357 (1982). The *Holman* panel nevertheless considered itself bound by *Perez-Hernandez*, 680 F.2d at 1356 n.11, noting that en banc review is appropriate to resolve an intra-circuit disagreement. Because the Eleventh Circuit concluded in both *Perez-Hernandez* and *Holman* that the government had successfully rebutted the defendant's prima facie showing of discrimination, and accordingly affirmed the challenged convictions (672 F.2d at 1387-1388; 680 F.2d at 1357), neither case has provided the appropriate opportunity for further consideration of the issue within the Eleventh Circuit. But given the likelihood of reappraisal should the issue again arise in that court, and the serious flaws in the *Perez-Hernandez* panel's analysis, there is no occasion for this Court to resolve any tension between the decision below and *Perez-Hernandez*.[8]

2. Petitioners next contend (Pet. 15-33) that the failure of the federal Drug Enforcement Agency to employ the Attorney General's authority under 21 U.S.C. 811(a) to remove cocaine from Schedule II of the listing of controlled substances established by 21 U.S.C. (& Supp. V) 812, where it was placed by Congress, rendered the indictment upon

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[8]We note as well that there would be no need to resolve this issue in this context should the Court conclude that discrimination in selection of forepersons provides no basis for vacating a conviction. See page 6 note 3, *supra*, and page 9 note 7, *supra*.

which they were convicted invalid. Petitioners urge that the district court was required to hold an evidentiary hearing on their claim that the Schedule II classification should be altered. The court of appeals rejected this contention (Pet. App. A-14 to A-16), relying in part upon its prior decision in *United States* v. *Alexander*, 673 F.2d 287 (9th Cir. 1982). Because neither the DEA nor the Attorney General had any obligation to reconsider the classification established by statute, petitioners' claim is without merit, and conducting an evidentiary hearing thereon would have served no useful purpose.[9]

In 21 U.S.C. (& Supp. V) 812 Congress has established a classification of controlled substances, placing cocaine into Schedule II of that classification. Under 21 U.S.C. 811(a), the Attorney General is *authorized* to adopt regulations reclassifying any substance upon making the findings outlined in Section 812 for the particular category of controlled substances. But, as the courts of appeals have observed, there is no requirement that he do so. *United States* v. *Alexander, supra*, 673 F.2d at 289; *United States* v. *Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980). Petitioner has cited no authority whatever in support of his contrary contention.

Under 21 U.S.C. 811(a) an interested party may petition the Attorney General to consider by rulemaking whether to reclassify a particular controlled substance. Any determination made in such a proceeding is subject to judicial review under 21 U.S.C. 877. Petitioner appears to suggest (Pet. 22) that he must also be allowed to challenge the classification

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[9]Because petitioners' attack upon the classification of cocaine is without foundation, there is no need to consider their further argument (Pet. 23-33) that the convictions must be set aside because of the invalidity of the classification which governs the penalty for the offense. See 21 U.S.C. (& Supp. V) 841-843.

of cocaine in his defense of the criminal charge lodged against him. But Congress had no obligation to provide any form of administrative reclassification remedy and judicial review; a fortiori there is no need to allow petitioners to challenge the existing classification in defense of a criminal charge. Cf. *Lewis* v. *United States*, 445 U.S. 55 (1980).

3. Petitioner Coletta contends (Pet. 33-37) that the warrantless search of his travel bag was unlawful. He argues specifically that it was neither a proper automobile search under *United States* v. *Ross*, No. 80-2209 (June 1, 1982), nor a proper search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981). The court of appeals held alternatively (1) that the cocaine was in plain view in Coletta's open travel bag at the time the agents seized it (Pet. App. A-17 to A-18), and (2) that the warrantless search of the travel bag was, in any event, proper under *United States* v. *Ross*, *supra*, because the agents had probable cause to stop Coletta's car and to believe that the car contained contraband (Pet. App. at A-18 to A-20). The court noted as well that probable cause extended to but was not limited to Coletta's travel bag and that the search of that bag was accordingly a proper part of the automobile search (*id.* at A-20).

Petitioner's contentions do not warrant review. First, petitioner ignores the court of appeals' alternative holding that the contents of his bag were in plain view. In light of this unchallenged holding no further justification for the "search" is needed. It is therefore unnecessary to unravel the confusion petitioner creates respecting the holdings of *New York* v. *Belton* and *United States* v. *Ross*. In any event, both of petitioner's contentions are frivolous. The very facts that he claims (Pet. 35, 37) distinguish this case from *United States* v. *Ross*, were actually present in *Ross* itself. Slip op. 2-3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

DOJ-1983-01